UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

INTERNATIONAL UNION OF
OPERATING ENGINEERS LOCAL
NO. 324 AND 324-A, AFL-CIO

and

Case No. 07-CB-109303

MICHIGAN CONVEYOR
MANUFACTURERS ASSOCIATION

Donna M. Nixon, Esq.
for the General Counsel.
Amy Bachelder, Esq., (Sachs Waldman, P.C.),
for the Respondent.
Gary S. Fealk, Esq., Ronald E. Reynolds, Esq.,
(Vercruysse Murray, P.C.),
for the Charging Party.

DECISION

Statement of the Case

KENNETH W. CHU, Administrative Law Judge. This case was tried in Detroit, Michigan on June 2, 3, and 4, 2014. The Michigan Conveyor Manufacturers Association (MCMA) filed the charge on July 15, 2013[1] and the General Counsel issued the complaint on November 7. The Respondent, International Union of Operating Engineers, Local 324 and 324-A (Respondent) filed a timely answer denying all material allegations in the complaint.

MCMA is an organization comprised of various employers primarily engaged in the construction, installation and maintenance of conveyor systems for the automotive and other industries. One organizational purpose of MCMA is to negotiate and administer collective-bargaining agreements with various labor organizations, including the Respondent.

The complaint alleges that MCMA and Respondent reached complete agreement on the terms and conditions of employment on July 1 to be incorporated in a collective-bargaining agreement and since on or about July 9, the Respondent has failed and refused to execute the agreement and has failed and refused to bargain collectively with MCMA in violation of Section 8(b)(3) of the National Labor Relations Board Act (NLRA/Act) (GC Exh. 1 [A-P]).[2] The General

[1] All dates are 2013 unless otherwise indicated.

[2] The General Counsel exhibits are identified as "GC Exh." The Respondent exhibits are identified as "R Exh." and exhibits of the MCMA Employer-members are identified as "E Exh." The closing briefs for the GC, Employer and Respondent are identified as "GC Br.," "E Br.," and "R Br." The Transcript testimony is noted as "Tr."

Counsel argues that the parties reached a complete signed agreement on July 1 and the Respondent never informed MCMA that the agreement was conditioned on a ratification vote. The Respondent argues that MCMA was informed it always had a general practice to have agreements and modifications ratified.

The counsel for the General Counsel moved to amend the remedy portion of the complaint (GC Exh. 1 [P]) at the hearing. That portion of the complaint states

> (a) Upon the Charging Party's request, execute the July 1, 2013 agreement described above in paragraph 9(b) and apply it retroactively to July 1, 2013. If the Charging Party does not request execution of the July 1, 2013 agreement, upon request, Respondent must reinstate the terms of the 2010-2013 collective-bargaining agreement and bargain with the Charging Party until an agreement or lawful impasse is reached.

The counsel for the General Counsel moved to amend the above paragraph as follows

> (a) Upon the Charging Party's request, execute the July 1, 2013 agreement described above in paragraph 9(b) and apply it retroactively to July 1, 2013. If the Charging Party does not request execution of the July 1, 2013 agreement, upon request, Respondent must reinstate the terms of the 2010-2013 collective-bargaining agreement.

The amendment would add the following

> 2(c) Rescind any agreements made between Respondent and any employer-member including but not limited to the March 27, 2013 through May 31, 2018 agreement between Respondent and the Great Lakes Fabricators and Erectors Association (GFLEA), as it applies to the employer-members of the Charging Party, and make whole all employer-members for any expenditures pursuant to said agreements which they would not have been obligated to make under the July 1, 2013 agreement.

The counsel for the Respondent argued she should be permitted to litigate the appropriateness of the rescission as a remedy at trial.[3] The General Counsel argued that the amendment rescinding any agreements made between the Respondent and any employer-member associations would affect the remedy in the complaint and therefore, is appropriate for in compliance proceeding. During this discussion, an attorney[4] for GLFEA sought to intervene as a third party and argued that the motion to amend the remedy to rescind any agreements made between the Respondent and other employer-member associations would affect the collective-bargaining relationship between GLFEA and the Respondent.

At trial, I granted the motion to amend the remedy portion of the complaint and agreed with the General Counsel that the parameters of the amended remedy was an issue best taken at a compliance proceeding. I stated if there is an impact of this remedy (i.e., rescission of any employer-member agreements) on GLFEA (as well as other multiemployer associations not

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[3] The counsel for the General Counsel gave notice to the Respondent of her intent to amend the remedy at a pre-trial conference call on May 30. The counsel for the Respondent indicated that she was prepared to litigate this issue at the hearing. No ruling was made on the motion to amend during the pre-trial conference call.

[4] Michael Asher from Sullivan, Ward, Asher and Patton, P.C. was the representative for GLFEA at the hearing (Tr. 7, 8).

present at the hearing) that the matter would be appropriately resolved in a compliance proceeding if necessary (Tr. 1-16).

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, MCMA and the Respondent, I make the following

Findings of Fact

I. Jurisdiction and Labor Organization Status

At all material times, Central Conveyor Company, Central Processing Engineering, LLC, Dearborn Mid-West Conveyor Company, Commercial Contracting Corporation, Aristeo, Duke & Duke Services, Overhead Conveyor Company, Anchor Conveyor, Jervis B. Webb, Commercial Contractors, Acco, Alberici Construction and J.S. Alberici have been employer-members of MCMA and have authorized MCMA to represent them in negotiating and administering collective-bargaining agreements with Respondent (Tr. 33).

During a representative 1-year period, the employer-members collectively in conducting its operations purchased and received at their respective facilities within the State of Michigan, good and materials valued in excess of $50,000 directly from points outside the State of Michigan. At all material times, MCMA has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Respondent admits, and I find, is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Background Facts

1. Overview and Bargaining History

MCMA is an association of employers engaged in the design, manufacture, installation, maintenance of conveyors and tooling equipment primarily in the automotive industry. The employer-members of the association at the time of the complaint are Central Conveyor Company (Central Conveyor), Central Processing Engineering, LLC (Central Processing), Dearborn Mid-West Conveyor Company (Dearborn), Commercial Contracting Corporation (Commercial Contracting), Aristeo, Duke & Duke Services (Duke), Overhead Conveyor Company (Overhead Conveyor), Anchor Conveyor (Anchor), Jervis B. Webb (Webb), Commercial Contractors, Alberici Construction (Alberici), J.S. Alberici and Acco. MCMA has been in existence as a multiemployer association since the 1950s.

An organizational purpose of the association is to negotiate and administer multiemployer collective-bargaining agreements with various unions, including Respondent Local 324 of the Operating Engineers (Tr. 33, 126, 229-231). When companies join MCMA, they consent to allow the association to bargain on their behalf with various unions (GC Exh. 39). The association's bargaining representatives act as the spokesperson for all conveyor companies that had joined MCMA. The goal is to negotiate a single collective-bargaining agreement that will apply to each company and the union.

The Respondent Local 324 represents approximately 15,000 members throughout the State of Michigan. The Respondent represents workers in two industries, construction and

stationery. In construction, the unit employees operate various types of equipment to move, excavate, and install material at construction work sites (Tr. 281, 282). This complaint covers only the construction trade unit employees.

MCMA and the Respondent has enjoyed many years of a negotiated collective-bargaining relationship. Prior to 2007, MCMA and GLFEA engaged in joint collective-bargaining agreements with the Respondent and other labor organizations. In 2007, MCMA stopped joint bargaining with GLFEA and negotiated a separate agreement with the Respondent. Larry Estes (Estes), who is and has been the president of MCMA for the last 10 years[5], testified that MCMA negotiated a separate agreement with the Respondent because it seems that GLFEA was not allowing MCMA to provide input during the joint negotiations with the Respondent.

MCMA and the Respondent entered into an agreement from June 1, 2007 to May 31, 2010. In reaching an agreement, MCMA and the Respondent negotiated the changes from the prior contract and reflected those changes in an agreement signed by the parties (GC Exh. 29). The agreement contained the negotiated changes, but not all the terms of the prior contract. The changes would be incorporated into the existing terms of the prior contract, which would be printed as a full master agreement. The parties do not sign the full agreement. No credible evidence was proffered that the 2007 agreement required a ratification vote (Tr. 127-131; GC Exh. 30).

The parties reached a successor agreement from June 1, 2010 to May 31, 2013 (GC Exh. 2). The agreement was captioned "Tentative Agreement" between MCMA and the Respondent and covered changes to the 2007-2010 contract. The September 9, 2010 tentative agreement did not state that it was conditioned on ratification by the Respondent or that the Respondent reserves the right to "add, to subtract from or modify" the tentative agreement. No credible evidence or testimony was proffered that the September 9 agreement was conditioned on a ratification vote or that MCMA was informed that the agreement was contingent on ratification.

Estes testified that similar to the 2007 negotiation, the signed tentative agreement reflects the changes to the prior contract which would be incorporated along with the remaining unchanged terms into a new master agreement (Tr. 131, 132). The tentative agreement was signed by the parties on September 9, 2010 (GC Exh. 31).

2. The Start of Bargaining in 2013

The 2010-2013 agreement contains a specific method for termination of the agreement (GC Exh. 2 at 30) and provides

> This Agreement shall remain in full force and effect until the first day of June, 2010 and thereafter shall renew from year to year unless either parties hereto shall notify the other party, in writing, at least ninety (90) days prior to any anniversary date of this agreement of its desire to change the agreement in any way or to terminate the Agreement. Such written notice shall be sent by Certified or Registered Mail to the other party. In the event of notice by either party to change and/or terminate, and no agreement of such changes and/or termination is reached prior to June 1, 2013, this Agreement shall be deemed to have terminated Midnight, May 31, 2013.

[5] Estes is the owner of Central Conveyor. He testified that his spouse is the owner of Central Processing (Tr. 25, 126).

It is not disputed that the Respondent failed to follow this procedure to open negotiations for a new agreement. In February 2013, the Respondent hand delivered a proposal to MCMA. Douglas W. Stockwell (Stockwell) testified that he is and has been the business manager for the Respondent since September 2012 and admitted that the Respondent failed to send the certified letter to begin negotiation for a new contract within the 90 day time frame (Tr. 332, 341). Nevertheless, Estes contacted Stockwell's office to begin negotiation for a new contract after receiving the February proposal (Tr. 133-135).

Richard Wells (Wells), president of Central and the recording secretary for MCMA, testified that the Respondent proposal contained language for a hiring hall and a wage increase of $2 dollar per hour in each year (Tr. 39; GC Exh. 14). Wells said that he contacted Stockwell to set up a date and time to negotiate. Wells said there was no discussion about ratification in his conversation with Stockwell (Tr. 91, 92, 112).

It is also not in dispute that there was urgency by the Respondent to extend the agreement with MCMA by March because the State of Michigan had enacted right to work legislation in December 2012 and due to take effect on March 28.[6] The extension of the current contract prior to March 28 would have delayed the application of the right to work statute (Tr. 39, 40, 332).

3. The March 12 Bargaining Meeting

Despite not having the contractually obligated notice, MCMA met with the Respondent on March 12 to discuss the proposed contract (Tr. 40). Present at the meeting for MCMA bargaining committee were various representatives of the employer-members. Estes, Wells, Thomas Woodbeck (Woodbeck) from Overhead Conveyor, Jeff Brinker (Brinker) and Todd Begerowski (Begerowski) from Dearborn, David Hurst (Hurst) from Aristeo, Jim Schultz (Schultz) from Central, and William Altman, legal counsel.[7] Present at the meeting for the Respondent bargaining committee were Stockwell, vice president Dan Boone (Boone), assistant to the business manager Ryan Dunn (Dunn), the financial secretary Ken Dombrow (Dombrow), and union member Tom Scott (GC Exh. 4; Tr. 41, 42). Estes and Stockwell were the chief spokespersons throughout bargaining (Tr. 42, 136).

The Respondent constitution requires that any collective-bargaining agreements or modifications be ratified before they are executed except where the bargaining committee is delegated the authority to approve such agreements and modifications without a vote of its members (GC Exh. 4 at 105, 106). Stockwell testified that the Respondent bargaining committee was delegated with the authority to enter into a collective-bargaining agreement with MCMA without the need for membership ratification because of the Michigan right to work statute. Stockwell said that the bargaining committee was given this authority in February in order to quickly act in reaching an extension in light of the Michigan right to work statute. Stockwell maintained that this authority did not extend beyond the effective date of the statute (Tr. 308, 309). It is unclear that the MCMA bargaining committee was aware that the Respondent bargaining committee had this authority at the March 12 meeting (Tr. 318).

[6] Among other provisions, the Michigan right to work law states that an individual would not be required as a condition of employment to become or remain a member of a labor organization and not required to pay dues, fees, assessments or other charges of any kind or amount to a labor organization.

[7] Woodbeck is the president of Overhead Conveyor; Brinker is vice-president of Dearborn; Hurst is the general manager of Aristeo.

Wells testified that the MCMA bargaining agents were not aware that any agreement or modification required ratification by the Respondent. He said that ratification was not discussed at the March 12 meeting (Tr. 47, 92, 111, 112). It is clear that ratification was not discussed at the March 12 meeting. Wells' testimony is consistent with testimony provided by Stockwell (Tr. 346), Boone (Tr. 380, 381), Estes (Tr. 139), Brinker (Tr. 196), and Hurst (Tr. 237). Wells testified that MCMA had an initial proposal on March 12 and that he took notes during this meeting. Wells' handwritten notes did not mention that ratification was a condition precedent to a final agreement (GC Exhs. 12, 15).[8] Estes testified that the Respondent never previously mentioned that the 2007 or 2010 agreements were conditioned on ratification (Tr. 155-157; E Exh. 2). Brinker and Hurst testified they were involved in the 2010 negotiations and that ratification of the agreement was never discussed or raised by the Respondent (Tr. 225, 268).

Stockwell testified that all agreements and modifications needed to be ratified except when delegated with the authority that ratification was not required. Stockwell said that he was not a union official during the time of the 2007 and 2010 agreements, but had attended the meetings to vote for ratifying the agreements (Tr. 310-314). Stockwell admitted he does not know if Respondent informed MCMA that agreements and modifications had to be ratified or if MCMA had received a copy of the Respondent's constitution at anytime during negotiations for the prior agreements (Tr. 315-318). Wells testified that he never received a copy of the Respondent's constitution in his role as the recording secretary for MCMA during the past three years (Tr. 90).

Wells testified that the major issues discussed at the March 12 meeting were wages, length of the contract, guaranteed 40 hour work week, drug testing, inspection (grease) time, and a hiring hall for referring union members. Wells testified that operators are required to inspect and grease their equipment. Wells said that the inspection and grease work is done 30 minutes before the start of the eight hour work day. The operators are paid for their 30 minutes. MCMA proposed that the inspection be conducted during the regular eight hour day. Wells also explained about the guaranteed 40 hour work week. Wells testified that MCMA was proposing that only the most senior worker for each trade would be paid a guaranteed 40 hour work week (even if the job goes less than 40 hours), which is consistent with the national maintenance agreement (GC Exhs. 12, 15). Under the current contract, each operator is guaranteed a 40 hour week (Tr. 45-47).

The Respondent opposed having the inspection done within the eight hour work day. Stockwell contended that supervisors would pressure the operators to begin working right away without allowing them the time to inspect the equipment. The Respondent also insisted on a guaranteed 40 hour work week. Stockwell believed that the guaranteed 40 hours of work prevents supervisors from working an operator extra hard for one or two days and then giving him no work for the rest of the week (Tr. 282, 283).

Stockwell testified that the March 12 meeting started on the wrong foot due to a number of outstanding issues. He corroborated the testimony of Wells on some of the outstanding issues. Dombrow's bargaining notes for this session reflected the Respondent's opposition to each of MCMA proposed items. There was no mention of ratification in his notes (GC Exh. 41).

[8] Brinker also took notes during this bargaining session. His notes reflect the Respondent's opposition to the initial MCMA proposed items. There was no mention regarding ratification in his notes (GC Exh. 35).

At the end, Stockwell testified that the guaranteed 40 hours and inspection time were the biggest hurdles in reaching an agreement (Tr. 282-284). Stockwell testified on direct examination (Tr. 283)

> Q. At the time you got towards the end of negotiations, what were the major issues?
> A. The guaranteed 40, the inspection time, and I'm going to say those were the stickers.[9]

Unable to reach an agreement, the parties agreed to bargain again on May 21.

4. The May 21 Bargaining Meeting

The same individuals for the bargaining committees were present at the May 21 meeting except that Gary Fealk (Fealk) replaced Altman as legal counsel for MCMA, Tom Scott was not present and Respondent president, Scott Page (Page), attended the meeting (GC Exh. 32).

Wells testified that MCMA presented a second proposal that essentially reflected its first proposal except that a wage increase, an extension for 5 years, and the referral system (hiring hall) were added for discussion. Wells insisted that ratification was not mentioned during the meeting (TR. 49-51; GC Exh. 20). Estes testified that the session lasted approximately 90 minutes and that the three outstanding issues for the Respondent were the guaranteed 40 hours, inspection (grease) time and the referral system. Estes insisted that there was no mention or discussion about ratification (Tr. 139-141).

Stockwell confirmed that ratification was not discussed or mentioned at the May 21 meeting. Stockwell believed the Respondent made a proposal at this meeting, but no evidence was proffered to reflect such testimony (Tr. 345-348). Boone, Dunn, and Scott testified they could not recall that ratification was mentioned or discussed at the May 21 meeting (Tr. 381, 483, 508). Dombrow's bargaining notes for this session reflected that the Respondent wanted a three year contract and there were some discussions on the hiring hall. There was no mention in the bargaining notes of Dombrow and Wells about ratification during the session (Tr. 446, 447; GC Exh. 41, 12 at 3).

The parties were unable to reach an agreement. Wells testified that the parties did agree to extend the current contract since it was set to expire on May 31 (Tr. 51). The parties signed an extension on May 29, agreeing to extend the contract through June 30 (GC Exh. 3; R Exh. 3). On June 1, the Respondent sent a certified letter to MCMA to meet and confer to negotiate a new contract with notification to the Federal Mediation and Conciliation Service (FMCS) (GC Exh. 5). It is clear that the notice to bargain should have been sent by Respondent in February when the initial request to bargain was made in order to be in compliance with article 29 of the contract "Renewal and Change" (GC Exh. 2 at 30). Nevertheless, MCMA continued to meet and bargain on June 14.

5. The June 14 Bargaining Meeting

The June 14 session was relatively short with the same individuals in attendance as in the previous session. Both parties presented proposals (GC Exhs. 21, 33). The parties were in agreement for a 5 year contract, but disagreed on mostly everything else. Wells testified that Stockwell indicated that the parties were "not getting anywhere." Wells, Estes, Brinker, and

[9] Boone also testified that the guaranteed 40 hour and the safety inspection time were "sacred cow(s)" with the membership (Tr. 373).

Hurst testified that there was no discussion on ratification at the session (GC Exhs. 19 at 3, 21, 33; Tr. 56-58; 142, 198, 239). Stockwell testified that not much was being discussed at the June 14 meeting. He said there was no reason to discuss ratification because a tentative agreement was not reached by the parties (Tr. 318, 348, 349).

Estes suggested a mediator for their next session. Estes and Stockwell confirmed that having a mediator at the next session would be helpful (TR. 142, 239). Prior to the meeting, Fealk emailed Stockwell on June 14 that the mediator was not available before June 30. Since the current contract was to expire on June 30 (after the Respondent granted the first extension), Fealk requested a second 30 day extension (R Exh. 2). Stockwell declined to grant the extension but informed Fealk that the Respondent was willing to continue bargaining with a mediator (Tr. 284, 285).

6. The July 1 Bargaining Meeting

The parties met for the final time on July 1 at the FMCS office.[10] Everyone presented at the previous meeting were also at this session, except for Schultz and Begerowski. Page was present but left before 1 p.m. Both sides met in one large conference room with the mediator leading the discussion. According to Wells, the mediator explained his role at the meeting and informed the parties that he would be separating the two bargaining committees and the mediator would listen to the position of each side and shuttle between the two parties (Tr. 59, 60). Boone testified that the parties had a brief discussion before being separated (Tr. 371).

Stockwell testified that the parties first met in the large room and the mediator separated them by leaving the MCMA bargaining committee in the large conference room and directing the Respondent bargaining committee to another room. Stockwell said that the mediator went back and forth between the two rooms, but no progress was being made (Tr. 289, 290). The testimony of Hurst and Page essentially corroborated what had occurred at the meeting up to this point (Tr. 239, 500). The parties disagreed to what occurred next. The mediator suggested a sidebar session. MCMA said that there was one sidebar. The Respondent maintained there were two sidebars. Both sides disagreed as to who attended the sidebar(s).

Dunn testified that the initial meeting in the large conference room was brief and contentious (Tr. 424). Wells testified that the mediator suggested that a sidebar would be helpful. Wells said that Fealk, Estes and Stockwell attended the sidebar. He did not recall if anyone else attended (Tr. 60). Estes testified that he, Fealk and Stockwell attended (Tr. 144). Wells said Estes reported back that negotiations were not going well (Tr. 61).

Stockwell testified that the mediator suggested the breakout session and that Boone and Page attended the sidebar. He recalled that Estes was in attendance, but no one else from MCMA. Stockwell testified there was no progress being made at the breakout session and a second sidebar was convened by the mediator. Stockwell said that he attended the second sidebar with Page. He recalled that Fealk and Estes were in the second sidebar. Stockwell testified that the sidebar negotiation was not going well and told Estes and Fealk that “we’re done here for today and got up and walked out the room” (Tr. 290). Boone testified to two sidebar meetings. Boone testified that he and Page met with Fealk during the sidebar with no progress being made. Boone also said that the mediator called a second sidebar with Fealk and Page. Boone testified that the second sidebar proved no better results and the individuals returned to their respective groups with the Respondent ready to walk out (Tr. 372-374).

[10] The witnesses agreed there were two mediators, but only one was the lead (James Statham).

Page testified that Fealk asked for the sidebar meeting after the shuttle diplomacy by the mediator was unproductive. Page said that he, Boone, Fealk, and the two mediators attended the sidebar. Page testified that the parties were in disagreement on two items, to wit: the guaranteed 40 hours and the inspection (grease) time. Page said the parties were stuck with these two outstanding issues and believed the discussions had "fizzled out" for the day and the Respondent bargaining agents were ready to leave (Tr. 501-503).

Fealk testified that there was only one sidebar that he attended with Boone and Page. Fealk also said the two mediators attended the sidebar. He agreed with Page that the negotiations centered on the guaranteed 40 hours and inspection time. Fealk testified that Boone said the Respondent would never agree to give up the inspection time and guaranteed 40 hour week. Fealk said he was not in a position to discuss the two issues and at some point during the sidebar, Fealk went to get Estes and the Respondent went to get Stockwell. Fealk said that Boone and Stockwell made it clear that the Respondent was not agreeing to the elimination of the inspection time or to the guaranteed 40 hour work week. Fealk also said that Estes was very clear that the employers needed some relief from the two items. Fealk said that he and Estes left the room to talk with the mediator and while standing in the hallway, he observed Stockwell, Page and Boone leaving the room and returning to their conference room (Tr. 560-562). Fealk and Estes said the parties never discussed ratification during the sidebar (Tr. 152, 153, 563).

The parties also disagreed as to what occurred next. Wells testified that when Estes returned to the large conference room and informed MCMA employer-members that the negotiations were not going well; Stockwell popped his head in the room and informed them that the Respondent bargaining committee was leaving. Wells said that it was Hurst who asked Stockwell to "hold on." Wells said that Stockwell reiterated that the Respondent was not giving up the guaranteed 40 hours and Hurst responded that it was not a fair provision when there are holidays or blackout days and no work was being done. According to Wells, Stockwell replied that if MCMA is only talking about no pay on holidays and blackout days, "we might be able to agree on modifying the 40 hour work week." Stockwell allegedly stated there was also the issue with the inspection time. Wells testified Hurst replied that operators should be given time to grease and inspect their equipment, but it should be done during the regular eight hour shift. According to Wells, Stockwell's response was "that will really cost you" (meaning that MCMA would need to give up on other items). Wells testified that someone from MCMA said to give us a proposal, which Stockwell agreed to discuss with his bargaining committee (Tr. 61-63).

Stockwell testified that the Respondent bargaining committee was in the process of leaving the building when he stopped by the large conference room, knocked on the door and went in to say goodbye to the MCMA bargaining committee. Stockwell said that he was stopped by Woodbeck, who said "whoa, let's talk about this." Stockwell said that Hurst then got involved in the discussion about the guaranteed 40 hours and inspection time. Stockwell testified that there were two outstanding issues at this point, to wit: the inspection time and the guaranteed 40 hours. Stockwell explained that inspection time was sacred to the union, but he also said there was a distinction between a single operator responsible for his own equipment and a crane operator responsible for an entire crew. Stockwell inferred that the Respondent would be willing to consider having the single operator perform inspection time during the eight hour shift.[11]

[11] According to Stockwell, the use of the hiring hall for referring employees was no longer an issue because the parties were bound by the national maintenance agreement (Tr. 295).

Stockwell indicated that committee members of both group were coming in and out of the conference room and eventually everyone sat down in the conference room. Stockwell said that it was mostly quiet during his discussion with Hurst and Woodbeck. It was obvious that there was some movement on the two issues because Stockwell said that the Respondent bargaining agents decided to return to their conference room to write up a proposal (Tr. 291-296).

After a brief caucus, the Respondent returned with a handwritten proposal. The Respondent proposed 1) a five year contract extension; 2) giving up the guaranteed 40 hours on seven different weeks where there is a holiday (considered as black out days), allowance for inspection time by the operators of a certain type of equipment before operations begin, and a wage increase of $2.00 in the first year, $1.10 in the second year, and 85 cents each year for the reminder of the contract, with a total wage package of $5.65 dollars (GC Exh. 6).[12]

Upon receipt of the handwritten proposal, MCMA caucused and decided to accept the Respondent proposal as is. Wells testified that the Respondent wage increase proposal was higher than the MCMA last proposal and there was much debate because "it was a lot of money" (TR. 63). Fealk testified that Hurst wanted to make a counter proposal on the wages, but Estes advocated acceptance of the Respondent proposal because it gave almost everything wanted by MCMA (Tr. 565, 566).

Upon return to the large conference room, MCMA bargaining agents informed the Respondent of the acceptance of the hand written proposal. Wells said that he went with Fealk and the mediator to type up the handwritten agreement. Fealk dictated to him the language to type for the agreement[13] (TR. 63-67).

Boone had reiterated that any modification of the inspection time and the guaranteed 40 hours would never get by the union membership during the sidebar discussion. Boone said that the Respondent committee went in the large conference room to say goodbyes to the MCMA bargaining committee after the unsuccessful sidebar meeting. He said that the Respondent bargaining agents were ready to leave when the mediator caught Stockwell and asked him to go back in the room. Boone said that after the parties all sat down in the conference room, they reached a tentative agreement. Boone said that Fealk, Dunn and the mediator went elsewhere to type of the agreement. Boone did not testify that the Respondent had drafted a handwritten proposal (Tr. 373, 374, 383).

Dombrow testified that when Stockwell went into the conference room to say goodbye and there was a discussion "with some management people." The Respondent bargaining committee then went in and sat down. Dombrow believed that after much discussion, the parties reached some consensus and recalled a sidebar meeting. He said when the parties returned to the conference room, there was a verbal agreement. He said nothing was written up at this point. He said there was some back and forth regarding money and conditions and then

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[12] MCMA's last proposal on June 14 offered a wage increase of $1.50 for the first year, $1.00 for the second year and 75 cents for the reminder of a 5 year contract with a total wage package for $4.75 (GC Exh. 21).

[13] Wells was uncertain if Page was involved in the typing of the agreement. At one point, Wells said that it could have been Dombrow when the agreement was typed because Page had left the meeting early (Tr. 107, 115). On the other hand, Fealk testified that Dunn was present during the typing of the agreement (Tr. 566).

a round of handshakes in reaching a verbal agreement. He recalled that, Fealk, Dunn and the mediator went to type up the verbal agreement (Tr. 426-429).

B. Was Ratification a Condition Precedent?

Wells testified that the typed tentative agreement was signed by Estes and Stockwell and included everything that was in the Respondent's handwritten proposal (GC Exh. 7). The agreement was captioned as follows and stated

> Tentative Agreement Between the Michigan Conveyor Manufacturers Association and the IUOE Local 324
>
> 1. 5 year Agreement starting July 1, 2013 and expiring June 1, 2018
>
> 2. Year 1 wage increase - $3.00; Year 2-$1.10; Year 3-$.85, Year 4-$.85, Year 5-$0.85
>
> 3. Black out 7 holidays from 40 hour guarantee: 1) New Year's Day; 2) Memorial Day; 3) Independence Day; 4) Labor Day; 5) Thanksgiving Day; 6) Christmas Day; 7) President's Day/Floating Holiday, with exception of 1 foreman or general foreman. This modifies Article VII, Section C
>
> 4. Inspection Time-replaces Article XI, Section B.-IC200 and under, the Operating Engineer shall be provided adequate time to perform inspections prior to the operation of the said equipment.
>
> 5. Pension Contribution-Negotiated wage increases will first be allocated to satisfy any required Pension Fund contribution increase as a result of a Performance Improvement Plan or a Rehabilitation Plan or any other mandatory funding requirement.
>
> 6. The above Year 1 wage increase shall be effective the Monday following notification of the wage allocation by the Union or the Contractors.

Wells testified that the document was captioned "Tentative Agreement" because it did not include all the terms of the 2010 agreement, so the changes in the tentative agreement would then be incorporated into the 2010 agreement and published as a final agreement. Wells said that the parties understood that they had a complete agreement (Tr. 70, 71).[14]

Wells and Estes testified that the parties agreed to item five regarding the pension contribution (Tr. 65, 150). Wells testified that he suggested adding item six

> The above Year 1 wage increase shall be effective the Monday following ratification of the wage allocation by the Union to the Contractors.

Wells explained that item six was included because the employers needed to know from the Respondent as to the allocated amount for the various funds based on the new wage increase. Wells testified that the contractors needed to know the allocations as soon as possible. He said that once notification of the allocation was provided, the payroll could reflect the new amounts (Tr. 65, 66). Estes said that the employers would not know where to allocate

[14] As noted above, this procedural of negotiating for the changes and then merging the changes with the prior agreement had been used in the 2007 and 2010 contract negotiations.

the increase since there was now a wage increase of $2.00 (Tr. 151). Wells, Hurst and Estes testified that the allocation is determined on a year-by-year basis by the union. Estes testified

> A. Is it 25 cents going to go into healthcare, or it can go into union dues, it can go into pension plans. So they have to allocate the dollars before I can, you know, increase the $2 raise.
>
> Q. Okay, and who determines that?
>
> A. The Union.

Wells testified that the mediator made copies of the typed agreement. Wells recalled that the parties signed their copy of the agreement in separate rooms and came together in the conference room to exchange signatures, shook hands and left. He said there was no discussion regarding ratification of the tentative agreement at anytime on July 1. Wells said that Stockwell informed MCMA that ratification of the wage allocation had to be taken to the membership (Tr. 68, 69, 120). Estes, Fealk and Brinker all testified that there were never any comments or discussion regarding ratification of the tentative agreement at the July 1 meeting (Tr. 95, 167, 210, 211. 572). Hurst testified that "someone" from the Respondent's team said that the wage allocation needed to be ratified. Hurst testified that there has to be a ratification vote on the wage allocation. He assumed that would accomplish at a membership meeting, but was not certain as to the Respondent's practice. Wells, Estes, Brinker, and Fealk had no knowledge of the past practice of the Respondent if agreements are ratified or not. Hurst insisted that no one said that the agreement needed to be ratified (Tr. 245, 246, 252, 276).

In contrast, the Respondent insisted that the tentative agreement required a ratification vote. Stockwell explained his understanding with the wage allocation. He testified that the union leadership on the executive board would meet and prepare the allocations based upon the new wage increase and insert the allocations into the board's minutes. The minutes, along with the wage allocation, would be reviewed and ratified by the membership. The allocation is ratified before they are provided to MCMA. Stockwell testified that this was standard practice with the Respondent, but admitted that he does not know if MCMA was aware of this practice (Tr. 286-288, 324-326). With regard to ratification of the agreement, Stockwell testified that he stated to Woodbeck and Hurst that the tentative agreement had to be ratified by the membership. Stockwell believed his conversation occurred while the agreement was being typed by Wells and the parties were sitting around a large table and conversing on various topics. Stockwell testified that Hurst turned to him and said

> ..well, you can just sign this as we have a contract. And I said no, I have to take it back to my membership for ratification (Tr. 296).

According to Stockwell, Woodbeck then interjected

> ..well, you're going to recommend this aren't you? And I said, by all means, I'm going to recommend it (Tr. 297).

Stockwell said that everyone was in the room when the he told Woodbeck and Hurst about the need to ratify the entire agreement (other than the individuals that left the conference room to type up the agreement) (Tr. 330-332).

Boone testified that he heard the statement from Stockwell that the tentative agreement had to be taken back to the membership for ratification, but believed that the statement was made after the parties had signed the agreement (Tr. 375, 376).

Dunn testified that the parties were sitting around the table after the agreement was typed and had an open discussion with Dombrow (who was sitting to the right of Dunn), who turned to Dunn and said

> …that some information was left off the tentative agreement…we do not have the ratification language on the bottom of the agreement (Tr. 476, 477).

In response, Dunn said to Dombrow that

> …the other side understands it's upon ratification. And to my recollection, it was acknowledged that there was an understanding that there had to be ratified.

Upon further examination, Dunn said there was no discussion about acknowledging that the agreement needed ratification but he recalled that Fealk made a "general gesture" (by nodding his head) of conceding that ratification was required (Tr. 477, 481, 482). Dunn said that Fealk was sitting directly across from him at the table. Dunn also recalled hearing the conversation between Hurst and Stockwell that the agreement had to be ratified (Tr. 478, 479).

Dombrow testified that he told Dunn that there was nothing in the tentative agreement about ratification and that Dunn replied "They know it needs to be ratified." Dombrow believed that Fealk was "close enough to hear it" and nod his head in agreement, but admitted that he did not know if Fealk actually heard him talking to Dombrow because there were other conversations occurring at the same time. Dombrow also testified that Estes had signed the typed agreement in the large conference room and passed the document over to Stockwell for his signature. Dombrow said that while Stockwell was signing the agreement, Estes asked Stockwell if he (Stockwell) would recommend the tentative agreement and Stockwell responded in the affirmative when he takes "…it (the agreement) to the membership" (Tr. 430-434, 449, 459).[15] Boone testified that he believed Fealk overhead this conversation and affirmatively nodded his head (Tr. 378, 379, 386, 387).

Page testified that he did not hear ratification being mentioned on July 1 or in any prior bargaining sessions (Tr. 509).[16]

Fealk testified there was a quick discussion regarding Brinker's question as to when the agreement goes into effect after the Respondent returned with its handwritten proposal. Fealk said that someone from the Respondent bargaining committee replied that the allocation needed to be decided by the members, so the agreement would go into effect the first pay period after the ratification of the allocation. Fealk insisted that there were no discussions about ratification of the entire agreement. Fealk also said that Dunn never discussed ratification while the agreement was being typed.

[15] Dunn said that Dombrow was sitting to his right. Dombrow testified that Dunn was sitting to his right, followed by Boone at the table. Dombrow said that Fealk was directly across the table from him and that Wells was sitting next to Fealk (Tr. 430).

[16] Page had left early on July 1 before the agreement was signed.

Fealk testified that the mediator made copies of the typed agreement and the parties caucused to review and sign the agreement. Fealk said that some of Respondent bargaining agents were sitting around the table upon his return to the conference room with the signed agreement. Fealk testified that the parties were shaking hands and cordially conversing before leaving. Fealk said that the mediator was sitting at the head of the table and that he was sitting next to him and conversing on an unrelated topic. Fealk said he was not talking to Wells or Hurst. Fealk said that he did not hear Hurst telling Stockwell that the agreement did not need to be ratified. Fealk also did not hear a response from Stockwell. Fealk said that ratification was never discussed on July 1 and he never heard any conversation between Dunn and Dombrow about ratification. Fealk denied that he had nodded his head in consent (that the agreement had to be ratified) towards Dunn and Dombrow while they sat across the table (Tr. 566-573).

Milford (Woody) Woodbeck was a subpoenaed witness for the Respondent.[17] Woodbeck is the chair of Overhead Conveyors and his brother is Tom Woodbeck, the president of Overhead Conveyors. Woody testified that he had a conversation with Tom (Tr. 393-397). Woody testified that he was not involved in the 2013 negotiations with the Respondent, but Tom was on the MCMA bargaining committee. Woody had asked Tom whether there was any conversation about ratification on July 1 and Tom replied that ratification never came up. According to Woody, Tom said to him that nobody discussed ratification on July 1 because everyone knew (his assumption) that the agreement had to be ratified (Tr. 402-408).

C. The Respondent Formally Rejects the Agreement

Wells testified that he was informed by the Respondent during the bargaining session on July 1 that MCMA would be informed of the wage allocation by July 5. Wells said that MCMA received either a facsimile or email from the Respondent setting forth the wage allocations on July 5 (GC Exh. 8). The document stated, in part

> In accordance with the current Collective Bargaining Agreement between Michigan Conveyor Manufacturing Association Inc. and Operating Engineers' Local 324, please be advised that effective the first full payroll period on or after July 8, 2013, pending radification (sic), the following wage allocation is as follows:

It is noteworthy that the wage allocation was provided to MCMA on July 5 before the union voted on the allocation.[18] In response to the email, Fealk replied to Stockwell on July 8 and inquired whether the wage allocation was actually ratified because Stockwell requested that the allocations be effective on or after July 8. Stockwell replied to Fealk the morning of July 8 that the "…wage allocation had not been ratified" and the vote was planned for the evening of July 8 (GC Exh. 9).

The Respondent held its union meeting to vote on the agreement on July 8. Stockwell testified that he called his secretary to send out notice for a special meeting as soon as the

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[17] His testimony was allowed over the hearsay objection of the General Counsel.

[18] Stockwell explained that the Respondent already knew the wage allocations based upon the past practice of the prior two contracts so it was not necessary for the membership to vote on the allocation (Tr. 326, 327). I do not credit Stockwell's testimony on this point. If the wage allocation was already known to the parties, why would the parties feel that it was necessary to include language in the tentative agreement that the wage increase "…shall be effective the Monday following notification of the wage allocation by the Union or the Contractors?"

agreement was signed on July. Stockwell said that the notice went out on July 1 (Tr. 298, 299). The notice stated that "There will be an Operating Engineers Local 324 ratification meeting" on July 8 with Stockwell's name at the bottom of the letter (R Exh. 5). Stockwell said that a specific procedure was followed and the tentative agreement was distributed at the meeting (R Exh. 6, 7). He insisted that the Respondent leadership had recommended the agreement at the meeting (Tr. 303-306).

Stockwell testified that the employees rejected the tentative agreement by a substantial margin (R Exh. 5). He said that the inspection time was the biggest issue and that there was a membership motion not to come back (from negotiations with MCMA) with anything less than the terms and conditions to GLFEA (Tr. 306, 307). On July 9, Stockwell informed Fealk by email that the union members rejected the agreement and that the Respondent did not see any benefit to continue bargaining for a new agreement (GC Ex. 10).[19]

Fealk wrote to Stockwell by letter dated July 11, 2013 inquiring as to whether the Respondent believe that the parties are at impasse and if the Respondent was attempting to dissolve the bargaining relationship with MCMA. Fealk noted in his letter that MCMA and its members do not consent withdrawing from multiemployer bargaining (GC Exh. 13). In response, Stockwell wrote to Fealk on July 12 that the Respondent saw no purpose in maintaining dual agreements covering the same work since all employers have short form agreements with the Respondent (GC Ex. 23). Stockwell stated that

> Therefore, the Union has decided to discontinue bargaining with Michigan Conveyor Manufacturers Association. We expect that employers will contribute under the Great Lakes Fabricators and Erectors Association agreement pursuant to the short form agreements they have signed with the Union.

Not all MCMA members had signed short form agreements with GLFEA. Wells testified that he signed a short form agreement on behalf of Central Processing that only checked the MCMA agreement (Tr. 77, 78). Estes testified that Central Conveyor was abiding by the MCMA contract after bargaining ceased because his company had checked only MCMA in the short form agreement (Tr. 154). Aristeo had no short form agreement with the Respondent. Only Overhead Conveyor had a dual contract arrangement with MCMA and GLFEA. Nevertheless, the Respondent requested that MCMA employer-members abide by the GLFEA agreement and to report monthly fringe benefits contribution under GLFEA (GC Exh. 34). When Central Processing attempted to contribute the fringe benefits under MCMA, the fringe benefits pension fund informed Central Processing that it had incorrectly checked the short form agreement and that the employer should remit the fringe funds to GLFEA (Tr. 82; GC Exh. 24).

Timothy LaLonde (LaLonde) testified that he is the director of the fringe benefits pension fund and explained the reporting requirements and collection of the contractors' monthly contributions to the fringe fund. LaLonde stated that the allocation of the monthly benefit funds

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[19] A short form agreement is signed by an employer and states that the employer would follow the master agreement. Under a short form agreement, the employer also agrees to the wages and benefits of a different master agreement. Wells testified that a short form agreement would enable an employer-member to perform non-conveyor work so long as it abides by the wages and benefits of another master agreement (Tr. 75-78; GC Exhs. 16, 17). The Respondent informed each employer-member that inasmuch as an agreement with MCMA was not ratified, the Respondent expected the employers to follow the fringe benefit terms under the GLFEA master agreement (Tr. 78, 79: GC Exhs. 11, 22).

should correspond with the box that the contractor had checked (in the short form agreement) (Tr. 516-520; GC Exh. 25).

Since July 9, the Respondent had not sought to bargain with the MCMA.

Discussion and Analysis

The General Counsel argues that the Respondent violated Section 8(b)(3) of the Act when it failed to execute a contract with MCMA after an agreement was signed by the parties on July 1. The General Counsel contends that the Respondent failed to clearly and timely notify MCMA of any limitations or condition precedents to conclude an agreement.

The Respondent argues that the parties never reached a meeting of the minds with a final collective bargaining agreement and that it was not obligated to execute an agreement because the terms of the agreement was subject to ratification.

A. Legal Analysis

Section 8(d) of the Act requires that the parties in a collective-bargaining relationship, once an agreement is reached, to execute that agreement at the request of either party. Section 8(b)(3) of the Act provides that it is an unfair labor practice for a union to refuse to bargain collectively with an employer. A refusal by either the employer or the union constitutes an unfair labor practice under the Act. See *Graphic Communications Union District 2 (Riverwood International USA),* 318 NLRB 983, 990 (1995), and cases cited. Once it has been established that there has been a meeting of the minds, a contract may come into existence before its execution. *H. J. Heinz Co. v. NLRB*, 311 U.S. 514 (1941); *Hospital Employees Local 1199 (Lenox Hill Hospital)*, 296 NLRB 322 (1989).

It is also well established that where the parties execute a memorandum of agreement which incorporated provisions of the former contract with additional terms agreed upon, the parties are obligated to execute the full collective-bargaining agreement containing the entire agreement between the parties. *Electrical Workers Local 1228 (RKO General)*, 130 NLRB 342, 343-344 (1977); *Auto Workers Local 365 (Cecilware Corp.)*, 307 NLRB 189, 192 (1992).

The obligation to execute the contract arises only if the parties had a "meeting of the minds" on all substantive issues and material terms of the agreement. *Sunrise Nursing Home,* 325 NLRB 380, 389 (1998). The General Counsel bears the burden of showing not only that the parties had the requisite "meeting of the minds," but also that the document which the Respondent refused to execute accurately reflected that agreement. If it is determined that an agreement was reached, a party's refusal to execute the agreement is a violation of Section 8(b)(3) the Act. *Windward Teachers Assn.*, 346 NLRB 1148, 1150 (2006); *Cherry Valley Apartments*, 292 NLRB 38 (1988) (the burden of proof is on the party alleging the existence of the contract).

The expression "meeting of the minds" does not require that both parties have identical subjective understandings on the meaning of material terms of the contract. *Diplomat Envelope Corp.*, 263 NLRB 525, 535-36 (1982). "Subjective misunderstandings or misunderstandings as to the meaning of terms which have been agreed to are irrelevant, provided that the terms themselves are unambiguous judged by a reasonable standard." *Health Care Workers Union, Local 250 (Trinity House)*, 341 NLRB 1034, 1037 (2004); *Pittsburgh-Des Moines Steel Company,* 202 NLRB 880, 888 (1973). Instead, a meeting of the minds occurs where there has been agreement on "all substantive issues and material terms of the agreement." *Teamsters*

Local 771 (Ready-Mixed Concrete) 357 NLRB No. 173, slip op. at 5. The General Counsel has the burden of establishing that there has been an objective manifestation of agreement on such terms, thereby proving that an agreement was reached. *Teamsters Local 771*, above

The focus of the inquiry is not "the parties' subjective inclinations, but… their intent as objectively manifested in what they said to each other… [their] words and actions… [and] their 'tone and temperament.'" *Id.* The "hallmark indication that a binding agreement has been reached" consists of ending a meeting or series of meetings "with handshakes and mutual expressions of satisfaction on the successful outcome of their endeavor." *Id*.

In *Teamsters Local 471 (Superior Coffee*), 308 NLRB 1, 2 (1992), the Board held that the Union violated Section 8(b)(3) when it refused to sign an agreement and stated, in part

> In determining whether [an] underlying oral agreement has been reached, the Board is not strictly bound by technical rules of contract law but is free to use general contract principles adopted to the bargaining context. Also, *Americana Healthcare Center*, 273 NLRB 1728 (1985).[20]

As stated in *Teamsters Local 287 (Reed & Graham*), 272 NLRB 348 (1984), the test is whether or not applying an objective or reasonable standard, irrespective of the subjective opinions of the parties, mutual agreement on a contract was reached. Thusly, if words and conduct chargeable to one or any party have but one reasonable meaning, with respect to which the other party has noted concurrence, a contract will be deemed concluded on that basis. *Pittsburgh-Des Moines Steel Co*., 202 NLRB 880, 888 (1973).

B. Credibility

The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, and the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001). Credibility findings need not be all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi*, above.

C. The Respondent violated Section 8(b)(3) of the Act When it Failed to Execute the Agreement

1. Stockwell's Authority to Bargain on Respondent's Behalf

Before determining the ultimate question of whether the parties reached an agreement in their 2013 contract negotiations, it is first necessary to establish Stockwell's authority to speak and bargain on the Respondent's behalf. The duty to bargain includes the obligation to appoint a negotiator with genuine authority to carry on meaningful bargaining regarding fundamental issues. *Schmitz Food*, 313 NLRB 554, 560 (1993). The law is well settled that an agent

[20] It is well established that technical rules of contract do not control whether a collective-bargaining agreement has been reached. *Pepsi-Cola Bottling Co. v. NLRB*, 659 F.2d 87, 89 (8th Cir. 1981).

assigned to negotiate a collective-bargaining agreement is clothed with "apparent authority to bind the principle in the absence of clear notice to the contrary." *Las Vegas Sands, Inc.,* 324 NLRB 1101, 1108 (1997). The Board has held that "when an agent is appointed to negotiate a collective-bargaining agreement that agent is deemed to have apparent authority to bind his principal in the absence of clear notice to the contrary." *Univ. of Bridgeport*, 229 NLRB 1074 (1977). The 9th Circuit affirmed *Bridgeport*, emphasizing that "any such 'notice to the contrary' must be 'affirmative, clear and timely;'" *Las Vegas Stands, Inc. v. NLRB,* 172 F.3d 57 (9th Cir. 1999). Timeliness requires that such limitations be disclosed to the other party before an agreement is reached. *A.W. Farrell & Son, Inc.*, 359 NLRB No. 154, Slip op. at 3 (2013).

With respect to the question of an agent's authority to bind a principle, the Court in *Metco Products, Div. of Case Mfg. Co. v. NLRB*, 884 F.2d 156, 160 (4th Cir. 1989) stated

> In the context of collective bargaining, the NLRB has adopted a clear and simple rule regarding the creation of apparent authority on the part of a labor negotiator. The NLRB has long held that "when an agent is appointed to negotiate a collective-bargaining agreement that agent is deemed to have apparent authority to bind his principal in the absence of clear notice to the contrary. *University of Bridgeport*, 229 NLRB 1074. See also *Aptos Seascape Corporation* l94 NLRB 540 (1971), *Medical Towers Limited*, 289 NLRB No. 123 (l987) enfd. granted without opinion, *Medical Towers Ltd. v NLRB*, 862 F.2d 309 (3rd Cir. l988). The laudable purpose of this rule is to lessen the opportunities for ambiguity and confusion by requiring a party who chooses to negotiate through an agent to disclose any limitations on the agent's authority.

Here, it is clear that Stockwell had apparent authority to speak on the Respondent's behalf for the 2013 negotiations. None of the Respondent's witnesses disputed his authority. At no point during the negotiations did the Respondent's witnesses expressly limited Stockwell's authority. Stockwell (or his office) initiated the bargaining by hand delivering the Respondent's February proposal to the MCMA office. Stockwell testified that he was authorized by the Respondent to enter into a final agreement in March before the effective date of the Michigan right to work statute.[21]

Stockwell also testified that he was the chief negotiator during bargaining for the Respondent and was present throughout all the bargaining sessions. Further, once negotiations began, Stockwell was always the point of contact and chief spokesperson for the Respondent. Finally, all correspondence during the negotiations were directed to and responded by Stockwell. Accordingly, I find that Stockwell had the apparent authority as the labor negotiator to speak on behalf the Respondent.

2. There was a Meeting of the Minds

Going into the last bargaining session on July 1, the parties were faced with two outstanding and unresolved issues, which the Respondent deemed to be sacred cows. Stockwell and Boone testified that the two remaining issues preventing a final agreement were the guaranteed 40 hours and the inspection (grease) time. On July 1, the parties met at the mediator's office in a large conference room. There were some brief discussions and the

[21] Although Stockwell denied he continued to have the authority after the effective date of Michigan right to work statute, no credible evidence was proffered that would indicate the delegated authority to its bargaining committee to approve agreements and modifications without submission to a vote of its membership was timely and clearly rescinded by the Respondent.

mediator separated the parties. The MCMA bargaining agents remained in the large conference room and the Respondent committee was escorted to another room. The mediator began shuttle diplomacy between the two parties, but with no fruitful progress. The mediator suggested a sidebar session that was attended by Fealk, Boone and Page. There was some dispute as to who had initially attended the sidebar, but Estes and Stockwell subsequently also became involved in the sidebar discussion.[22] All witnesses testified that inspection time and the guaranteed 40 hours were debated and unresolved.

Although there was some disputes over the events leading up to the tentative agreement, it was clear that at the July 1 meeting, the Respondent's bargaining committee was leaving after the sidebar session proved unfruitful. While Fealk and Estes were talking with the mediator in the hallway, the Respondent bargaining committee gathered their belongings and began to head out of the building. On their way out, Stockwell stopped by the conference room to say goodbye to the members of the MCMA bargaining committee. At this point, it was either Hurst or Woodbeck telling Stockwell to hold on and wait a moment since the MCMA committee still felt that a tentative agreement could be reached. Stockwell did in fact stop, sat down and began discussing the two outstanding issues with the MCMA agents. At this point, Fealk and Estes returned to the conference room and everyone sat down in the large conference room with Stockwell, Hurst and Woodbeck did most of the talking.

During this discussion, Stockwell explained to Hurst and Woodbeck the significance of keeping the inspection time and the guaranteed 40 hours. Stockwell said that he fully understood the position of MCMA that it was unfair to pay a guaranteed of 40 hours for work that was not performed. Stockwell also explained that it would be acceptable to have less than the guaranteed 40 hours provided that the parties followed the national maintenance agreement and MCMA employers give three days' notice of a blackout day when the guaranteed 40 hours would not apply. With regard to inspection time, Stockwell said it would be acceptable to apply the additional time for the inspection of larger equipment where the operator is responsible for an entire crew and not to allocate additional time for inspection involving equipment operated by a single worker. With this understanding over the two remaining issues, the parties felt comfortable enough to caucus. After further discussions, the Respondent bargaining committee provided the mediator with a handwritten proposal. At the bottom of the handwritten proposal, the Respondent stated that the "union reserves the right to add, subtract from or modify the proposals."

Upon review of the Respondent's proposal, the MCMA bargaining committee accepted the terms of the proposal without any modifications or revisions.[23] The parties congratulated themselves, shook hands, and Fealk, Wells and Dunn retreated to the mediator's office to type the agreement. The mediator made copies of the typed tentative agreement and credible evidence indicated that Stockwell and Estes signed each of their agreement in separate rooms and then exchanged their signed agreements in the large conference room. The typed tentative agreement did not state that the union had the right to further add, subtract or modify the tentative agreement. The bargaining committees congratulated themselves and shook hands again and left the building to everyone's satisfaction.

[22] I believe the reason for the inconsistency as to the number of sidebars was due to the fact that other individuals subsequently attended the discussion making it seems like there were two sidebar sessions.

[23] There was some reluctance voiced over the wage increase proposal, but eventually MCMA agreed to the Respondent's proposed wage increase.

In *Vallejo Retail Trade Bureau*, 243 NLRB 762, 767 (1979), the Administrative Law Judge, with Board approval stated:

> The expression "meeting of the minds" in contract law does not literally require that both parties have identical subjective understandings on the meaning of material terms in the contract. Rather, subjective understandings (or misunderstandings) as to the meaning of terms which had been asserted to are irrelevant, provided that the terms themselves are unambiguous " judged by a reasonable standard." Citations omitted.

I find that the General Counsel has established that the parties reached a "meeting of the minds" on the terms of the collective-bargaining agreement. In applying the objective and reasonable standard under *Vallejo and Teamsters Local 287*, above, the parties had a clear meeting of the minds on the understanding of the material terms of the contract and that a mutual agreement was reached on July 1.[24]

To be sure, this is not a case where the parties' agreement itself included ambiguous language that precluded a meeting of the minds, and thus resulted in there being no contract. *Standard Parking d/b/a ABM Parking Services,* 360 NLRB No. 132 (2014). Here, it is not in dispute that on July 1, Stockwell made clear that there were two sacred issues preventing an agreement. Boone also testified to the same. Stockwell explained the significance of those two issues and said what would be needed to his satisfaction. With regards to the two outstanding issues, Stockwell clearly testified that it would be acceptable to him that the guaranteed 40 hours would not apply during the week of seven holidays and that the inspection time would continue except for single operated equipment.

I find that Stockwell was speaking with apparent authority that what would be satisfactory to him would also be acceptable to the Respondent. The MCMA committee affirmatively acknowledged their agreement to the verbal terms proposed by Stockwell. This gave the impetus for the Respondent to caucus and return with a handwritten proposal that fully addressed the two sacred issues of the guaranteed 40 hours of work and the inspection time. It is reasonable to conclude that if the two remaining issues were not fully vetted out during the caucus, the Respondent would not have returned with its proposal.

I also find that there the parties had a meeting of the minds that the typed agreement encompasses all the changes for the new contract and that there were no conditions precedent for the execution of the contract. Upon the review of the handwritten proposal, the MCMA bargaining committee did not modify or revise the Respondent's proposal. The proposal was clear and unambiguous to the parties and MCMA accepted the proposal without any revisions.

The handwritten proposal was typed and circulated among the bargaining committees. The Respondent bargaining agents did not object or asked for further modification of the typed agreement. There was no dispute over the words and no confusion regarding the meaning of the written agreement. Wells and other witnesses testified that there were no changes made from the Respondent's handwritten proposal except for the inclusion as to when the Respondent would notify MCMA of the wage allocation. The typed agreement did not contain the language reserving the union's right to add, subtract, or modify the agreement although such language could have been included since a Respondent bargaining agent was present

[24] Having found that the "meeting of the minds" occurred, I also find that at the tentative agreement morphed into the terms of a binding collective-bargaining agreement.

during the discussion and typing of the agreement. The tentative agreement did not state that the agreement was conditioned on ratification by the union membership.

The parties congratulated themselves, shook hands and ended the meeting. The mood of the parties after signing the agreement was most telling through Brinker's testimony (Tr. 203). He testified that after the parties left the building

> We went off on our merry way because we had an agreement, so that was a very positive thing; it was very euphoric. We had something that they proposed to us, so that meant they liked it. It wasn't our proposal; it was their proposal. We were happy.

It is obvious from the parties' words and actions that their "tone and temperament" on July1 signaled their belief that they had reached a complete agreement on a successor collective-bargaining agreement. *Brooks, Inc., v Ladies' Garment Workers,* 835 F.2d 1164, 1169 (6th Cir. 1987). They concluded the meeting with handshakes and mutual expressions of satisfaction on the successful outcome of their negotiations. The "hallmark indication that a binding agreement has been reached" consists of ending a meeting or series of meetings "with handshakes and mutual expressions of satisfaction on the successful outcome of their endeavor." *Teamsters Local 771 (Ready Mixed Concrete),* above, slip op. at 5.

3. The Respondent failed to Timely, Clearly and Unambiguously Notified MCMA of Ratification

In my analysis above, it was my opinion that the Respondent bargaining agents never timely and clearly provided notice as to any limitations to bargaining authority in negotiating for a contract. I further determined that the parties' tentative agreement was clear and unambiguous. The question remains as to whether the Respondent had timely and clearly notified MCMA that ratification was a condition precedent to a final agreement on July 1. The General Counsel argues that the Respondent failed to clearly and timely notify MCMA of any limitations to a collective-bargaining agreement. The Respondent argues that MCMA was clearly and timely notified that ratification was required before a final agreement.

I agree with the General Counsel. A condition precedent must be conveyed to the other party by a clear, timely and unambiguous notice. *Auto Workers Local 365*, above at 193, 194. The Board recently reaffirmed this policy and found that the union violated Section 8(b)(3) by repudiating a final agreement arrived at through negotiations by the parties' bargaining agent. The Board stated that "if the limitation placed on the negotiating authority is a condition precedent to a final and binding agreement the notice must be clear, unambiguous, and, disclosed to the other party before the agreement is reached." *Teamsters Local 771 (Ready Mixed Concrete)*, above, slip op. at 4.[25]

a. Ratification was not Discussed Before Signing the Tentative Agreement

Here, the undisputed credible evidence establishes that ratification was never discussed prior to the bargaining session on July 1. MCMA bargaining agents credibly testified that the

[25] The Respondent argues that the there was a condition precedent to a final agreement because the document was captioned "Tentative Agreement." I disagreed. It is far from a clear and unambiguous notice that there was a condition precedent to a binding agreement simply because the document was captioned "Tentative Agreement."

Respondent never discussed the need to ratify any agreement reached at bargaining and never discussed any ground rules for bargaining. Indeed, Stockwell, Boone, Dunn and other Respondent bargaining agents conceded that ratification was never discussed with MCMA prior to the bargaining meeting on July 1. Stockwell admittedly did not disclose to the MCMA bargaining committee that that he had the authority to bind the union membership to a contract without a ratification vote during the March 12 meeting because of the Michigan right to work statute.

It is also undisputed that ratification was not initially discussed on July 1 when the negotiating teams first met in the large conference room. The Respondent allegedly raised the issue of ratification at the sidebar session attended by Fealk, Boone and Page (and subsequently by Estes and Stockwell). Fealk and Estes credibly testified that ratification was not discussed during their sidebar session with Boone, Stockwell and Page. At best, Boone informed Fealk and Estes that the guaranteed 40 hours and inspection time were sacred cows to the union membership, but never said that the agreement had to be ratified. Accordingly, I find that Boone did not clearly and unambiguously disclose to the MCMA bargaining agents that ratification was a condition precedent at the sidebar session.

When the sidebar session proved unfruitful, the Respondent bargaining committee began to leave the building. Stockwell stopped at the large conference room to say goodbye to the MCMA bargaining committee. Hurst or Tom Woodbeck said “whoa” or “hold on” to Stockwell and requested that he talk some more and Stockwell agreed. At this point, the rest of the Respondent bargaining team went into the conference room and sat down. After further discussions, the parties reached a verbal understanding of the parameters of an agreement and the Respondent committee agreed to caucus.

Upon the return of the Respondent bargaining agents with a handwritten proposal, the MCMA considered and fully agreed to the Respondent’s proposed terms for an agreement without any additional changes. The parties disagree as to what next occurred.

The witnesses testifying on the General Counsel’s case-in-chief consistently and credibly stated that ratification of the contract was never discussed on July 1. At most, Wells, Estes, Hurst, Fealk and others heard that only the wage allocation needed ratification. In contrast, Stockwell said that after Fealk, Wells and Dunn had left the room to type up the handwritten proposal, Hurst allegedly said to Stockwell that he (Stockwell) could just sign this and we would have a contract. Stockwell replied to Hurst and Woodbeck that the agreement had to be taken back to the membership for a vote. In turn, it is alleged that Woodbeck asked Stockwell if he would recommend the contract and Stockwell replied in the affirmative. Stockwell said that everyone heard his statement. Boone confirmed he heard the statement made by Stockwell. Hurst denied that Stockwell mentioned ratification. Hurst said that Stockwell mentioned only the wage allocation needed to be ratified.

Upon my review, I do not credit Stockwell’s testimony on this point. Stockwell said that everyone in the room heard his conversation with Hurst and Woodbeck. He specifically recalled Fealk in the room listening to the conversation. However, Fealk, Wells and Dunn had already left the conference room to type up the agreement when Stockwell allegedly made his ratification statement. In subsequent testimony, Stockwell contradicted himself and admitted that Fealk and Wells were not in the room (Tr. 356). Respondent maintains that Tom Woodbeck, a member of the MCMA committee heard this conversation. Tom Woodbeck was not subpoenaed by the Respondent to testify. Instead, the Respondent subpoenaed Tom’s

brother, Woody Woodbeck. Woody testified that Tom never told him (Woody) that the Respondent had said anything about ratification on July 1.[26]

Additionally, Dunn and Dombrow had different versions of this conversation. Dombrow said that Stockwell made this statement about taking to the membership for ratification to an unknown person and it was Estes and not Hurst who responded if Stockwell will recommend the contract to the membership. Estes denied hearing this statement from Stockwell and denied asking Stockwell if he was going to recommend the contract. Dunn testified that Stockwell's statement regarding ratification was made to Hurst, but was not certain (Tr. 478). I do not credit the testimony of Dunn on this point. Dunn could not recall when Stockwell said to Hurst that the agreement had to go back for ratification. Dunn also could not recall what had precipitated the conversation between Stockwell and Hurst (Tr. 478, 479). It is obvious that Dunn could not place the time of Stockwell's statement regarding ratification because Dunn was not present in the conference room since it has been established that he departed with Wells and Fealk to type up the agreement.

Accordingly, I find that the Respondent never discussed or mentioned to the MCMA bargaining committee before the tentative agreement was signed that ratification of the tentative agreement was a condition precedent to a final collective-bargaining agreement.

b. Ratification was not Discussed after Signing the Tentative Agreement

After the Respondent's handwritten proposal was typed and signed, the two bargaining committees gathered once again in the large conference room. The MCMA bargaining agents gravitated to one side of a rectangular conference table while the Respondent bargaining agents were on the opposite side of the table. Various individuals were talking to each other and several conversations were occurring at the same time. Individuals also began congratulating each other and shaking hands on the signing of the agreement. The Respondent contends that ratification was again raised at this point. Dunn testified that he had an open conversation with Dombrow that was loud enough for individuals across from the table to hear their voices. Since Dunn was involved in the typing of the agreement, Dombrow turned to Dunn and said that the tentative agreement did not include ratification language at the bottom of the agreement. Dunn allegedly responded that MCMA knew the agreement was upon ratification. Dunn testified that Fealk overheard this statement and acknowledged the statement by nodding his head in the affirmative.

Upon my review of the record, I do not credit the testimony of Dunn and Dombrow on this point. Both Dunn and Dombrow were inconsistent as to where they were sitting when this conversation occurred. Dombrow testified that he was directly facing Fealk (Tr. 449). Dunn testified that he was directly facing Fealk (Tr. 495). Boone's testimony was entirely different. He testified that it was Stockwell who made a general statement that the signed agreement needed ratification and did not recall any response from the MCMA bargaining agents. Upon further questioning, he remembered that Estes said something to the effect, "we know that" (Tr. 375, 376). Boone also testified that he overheard the Dunn and Dombrow conversation and that Fealk just "shrugged it off" (Tr. 378. 379).

[26] The General Counsel moved to strike Woody Woodbeck's testimony as hearsay. The counsel for the Respondent argued that Woodbeck's testimony was an exception to the hearsay rule because it is an admission by a party opponent. I allowed his testimony to proceed (Tr. 403, 404). However, Woodbeck's testimony actually confirmed the fact that that ratification was not discussed by the parties on July 1.

I credit the testimony of Fealk and Hurst. Fealk testified that he was sitting at the far corner of the conference table talking to the mediator who was sitting at the head of the table. Fealk testified that he was speaking exclusively to the mediator. Fealk denied overhearing the conversation between Dunn and Dombrow and further denied that he nodded his head in agreement to the statement made by Dunn. Hurst testified that he never heard the conversation between Dunn and Dombrow although he was sitting either next (or near) Fealk (Tr. 552). In addition, Estes, Brinker and Wells never heard this conversation. Boone's testimony that Stockwell made a general statement about ratification AFTER the agreement was signed cannot be credited since no one else testified to the occurrence of this event. Stockwell did not testify that he made such a statement and did not testify to the Dunn and Dombrow conversation (Tr. 299, 300).

Under the circumstances where the two bargaining committees were engaged in several conversations and extending congratulations, it is difficult and unreasonable to imagine that Fealk overheard the conversation between Dunn and Dombrow. It is further difficult to conclude that Fealk's nod was a sign that he agreed with Dunn's statement that ratification was required. The objective record also shows that the Respondent continued to represent to MCMA that only ratification of the wage allocation was required after the tentative agreement was signed by the parties. As noted above, in a series of correspondence between Stockwell and Fealk, Stockwell never mentioned that a ratification of the agreement was required. Stockwell's undated letter to Fealk states that there is a 'current Collective Bargaining Agreement' between the parties and proceeds to set out the wage allocation for the $2.00 wage increase. In previous testimony, Stockwell indicated that the wage allocation was determined by the union executive board and entered into the minutes of the meeting. In my opinion, Stockwell's letter to Fealk represented that the wage allocation had already taken place (by the union executive board) and now is waiting for ratification by the membership. This would be consistent with Stockwell's earlier testimony that wage allocation is determined by the executive board before ratification and consistent with Stockwell's email on July 8 to Fealk that the "wage allocation has not been ratified" (GC Exh. 8).

The Respondent maintains that MCMA knew that ratification of the agreement was a condition precedent based upon the past bargaining practice of the parties and the union constitution even if disclosure that ratification of the agreement was not timely, clear and unambiguous.

I find absolutely no credible evidence that the MCMA employer-members knew of the Respondent's past practice or were given a copy of the union constitution. Wells, Estes and other MCMA management officials testified they were unfamiliar and had no knowledge of the past practice of negotiations between MCMA and the Respondent with regard to ratification. I credit their testimony that they were never provided a copy of the Respondent's constitution and did not know of the past practice of the union as to whether the 2007 and 2010 agreements were ratified. Upon examination by the General Counsel, Stockwell conceded that he never informed the MCMA bargaining committee that ratification was required during the 2007 and 2010 contract negotiations. Stockwell believed that the MCMA employer-members knew ratification was a standard practice, but admitted that he did not know if MCMA was notified during the 2007 and 2010 negotiations that ratification was required[27] (Tr. 324, 325).

[27] The attempt by Respondent to show there was a past practice to put the 2007 and 2010 contracts to a vote was not credible. Correspondence from John Hamilton, the former Respondent General Vice President, on July 18, 2007 to Estes requesting his signature to the agreement did not mention there was

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The Board reaffirmed that "[i]f the limitation placed on the negotiating authority is a condition precedent to a final and binding agreement the notice must be clear, unambiguous, and, disclosed to the other party before the agreement is reached." *Teamsters Local 771 (Ready-Mixed Concrete)*, above at slip op. at 4. In that case, the Board found that the union violated Section 8(b)(3) by repudiating a final agreement arrived at through negotiations by parties' bargaining agents. In assessing whether the union's agent had full authority, it was first found that apparent agency was established when the union appointed a bargaining agent to engage in negotiations. Next, it was determined that the employer was not given "clear, unambiguous, and timely notice" of limited authority. Although in *Teamsters Local 771*, the union's agent did mention that he had to get the document signed by the president and ratified by the membership, this was only at the end of negotiations, after the parties shook hands, and was therefore found to be untimely. Given the timing and context of the statement regarding signature and ratification, it objectively appeared to be a mere "administrative function" rather than a condition precedent. *Id.* Finally, it was held that a letter from the union instructing that "all side agreements must be approved in writing" by the union's president was insufficient basis for notice of limited authority because the letter was sent to the employer's predecessor and there was "absolutely no evidence that the Employer ever saw the letter or knew of its contents." *Id.* at 5. A similar assessment here shows that apparent authority was established when the Respondent appointed Stockwell as its bargaining agent and never notified the MCMA bargaining committee of any limitations on his authority. Next, at no time before July 9 was clear, unambiguous and timely notice of any limited authority given to the MCMA employer-members. Assuming that the Respondent (through Stockwell) informed that ratification of the agreement was required on July 1, I find this was only said at the end of negotiations and therefore untimely. Even on the morning of the ratification vote, Stockwell continued to represent that there was a present collective-bargaining agreement between the parties and only mentioned to Fealk about ratification of the wage allocation. Finally, there is no credible evidence that the MCMA employer-members knew of the Respondent's past practice in ratifying agreements or were given copies of the union constitution.

Accordingly, given these facts, I find that Stockwell had the authority to bind the Respondent and the absence of any clear and timely notice that Stockwell's authority to bind the Respondent was limited. Consequently, the Respondent failed to clearly, timely and without ambiguity to disclose to the MCMA bargaining agents that ratification was a condition precedent to a final collective-bargaining agreement. I find and conclude that the Respondent violated Section 8(b)(3) of the Act when it refused and failed to execute the agreement on July 1.

D. The Respondent violated Section 8(b)(3) of the Act When it Refused to Bargain with MCMA

The General Counsel also argues that the Respondent failed and refused to bargain with MCMA when it repudiated its multiemployer bargaining relationship in violation of Section 8(b)(3) of the Act. The General Counsel contends that if the parties reached an agreement on July 1, then Respondent's action on July 9 in repudiating the agreement and refusal to bargain with MCMA is a violation of the Act.

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a ratification approval of the agreement (E Exh. 2). The tentative agreement for the 2010 contract purportedly showed that there was a ratification vote on August 20, 2010 (R Exh. 10), but the agreement was actually signed subsequently on September 10, 2010 (GC Exh. 31).

Having found above that the parties had entered into a binding five year agreement on July 1 and the Respondent violated the Act by failing and refusing to execute the final agreement. I now find that the General Counsel has shown that the Respondent refused to bargain with MCMA in violation of Section 8(b)(3) of the Act on July 9 and thereafter. Fealk's correspondence on July 11 to Stockwell inquired as to whether the Respondent believe the parties were at impasse and was refusing to engage in further negotiations to bargain (GC Exh. 13). Stockwell testified that the Respondent was only terminating its collective bargaining relationship with MCMA and not with the individual employer-members of MCMA. Stockwell responded that given the fact that MCMA employers had short form agreements with the Respondent, the Respondent perceived no purpose in maintaining dual agreements covering the same work. Stockwell expected the MCMA employers to continue contributing the funds under the GLFEA agreement pursuant to the short form agreements (GC Exh. 23). Stockwell believed that the Respondent could terminate the bargaining relationship with MCMA but still have the MCMA employer-members pay the fringe benefits under the GLFEA agreement through the contractors' short form agreements (Tr. 363-365).

In *Retail Associates*, 120 NLRB 388 (1958), the Board held that once a multiemployer bargaining unit is established, either party is permitted to withdraw from the negotiations only on timely written notice made prior to the contractually established date for modification of the collective-bargaining agreement or to the agreed-on date for the commencement of negotiations.

The Respondent argues that *Retail Associates*, above, is inapplicable in this situation. The Respondent contends that employers who have an 8(f) relationship with a union do not have an obligation to bargain for a successor contract absent a 9(a) relationship. The Respondent contends that under *John Deklewa & Sons*, 282 NLRB 1375 (1987), absent a 9(a) relationship, the union has no obligation to bargain a successor contract because the parties had not reached a complete and final agreement and thus, there was no untimely withdrawal from bargaining (R Br. at 29).

In *John Deklewa*, upon the contract's termination, the signatory union would not enjoy a presumption of majority status and either party may repudiate the Section 8(f) relationship. That is exactly what Stockwell unsuccessfully attempted to do on July 9 and 12. It is without dispute that Stockwell's letter of July 12 stated that "…the Union has decided to discontinue bargaining with Michigan Conveyor Manufacturers Association [and] that employers will contribute under the Great Lakes Fabricators and Erectors Association agreement pursuant to the short form agreements they have signed with the Union." By Stockwell's own admission, the Respondent refused to continue bargaining with MCMA. However, Stockwell incorrectly assumed that there was no agreement on July 1. Inasmuch as I found that the parties had entered into a binding contract on July 1, the holding in *John Deklewa* would not apply here.[28]

[28] The counsel for the charging party also argued that the 2010-2013 agreement rolled-over for an additional year on June 20, 2013 and on June 20, 2014 because Respondent failed to timely and properly give notice of termination at least 90 days prior to the termination of the 2010 contract by May 30, 2013 (GC Exh. 2 at 30). The charging party further contends that the Respondent failed to timely send a written notice at least 60 days prior to the expiration date pursuant to Section 8(d)(1) of the Act and to notify the FMCS within 30 days pursuant to Section 8(d)(3) of the Act. See, E Br. at 29-31. I agree. There is no dispute that the Respondent had failed to timely notify the MCMA to terminate the 2010-2013 contract and failed to timely notified FMCS within 30 days after "such notice of the existence of a dispute." Under either scenario, the General Counsel has shown that there was a valid negotiated collective-bargaining agreement on July 1 or alternatively, there was an annual extension of the 2010-2013

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Jaflo, Inc., 327 NLRB 88 (1998) (As the Respondent's attempt to withdraw was legally insufficient and as the union and the association reached an agreement, the Respondent is legally obligated to execute and abide by its terms). *Acme Wire*, 251 NLRB 1567, 1571 (1980). Further, *John Deklewa* is inapplicable here because the Respondent only sought to abandon a bargaining relationship with MCMA and not with the individual companies.

The General Counsel also contends that the Respondent inappropriately required the MCMA employer-members to abide by a collective bargaining agreement (GLFEA) that they were not a party to and therefore forcing the employers to agree to a non-mandatory subject of bargaining, i.e., the effective designation of the multiemployer association (GLFEA) as its bargaining representative and by forcing the employer to be bound by the association agreement. See, GC Br. at 18.

The counsel for the Respondent moved to strike that portion of the General Counsel's brief that attempts to expand the scope of the complaint by alleging that the Respondent's actions subsequent to July 9 are a violation of the act. The counsel for the Respondent argues that when a GLFEA representative sought to intervene in the hearing to protect the rights of the GLFEA short form agreements, the General Counsel took the position that

> At this point, Great Lake Fabricators has no part in this hearing because the issue in this hearing is whether or not there was a contract on July 1 and whether or not that should be binding on the Respondent. If we were to bring the issue of which contracts would be rescinded at this time, it would not be efficient for the purposes of the Act.

The Respondent maintains that the General Counsel is now seeking to expand the complaint in her closing brief to find that the Respondent has coerced employers to be bound by a multiemployer association, which they do not belong, as their collective- bargaining representative. See, R Br. at 2 and motion to strike. The General Counsel and charging party opposed the motion to strike.[29] The counsel for the General Counsel argues she did not sought to expand the complaint and that the allegations in the complaint clearly set forth the violations in the complaint.

I agree. Paragraph 12 of the complaint states that "On or about July 9, 2013, Respondent has failed and refused to bargain with the Charging Party" and paragraph 13 states "By Conduct described in paragraphs 11 and 12, the Respondent has been failing and refusing to bargain collectively and in good faith with the Charging Party, in violation of Section 8(b)(3) of the Act." Paragraph 12 serves more than just background information (as contended by the Respondent). Paragraph 12 is an allegation in the complaint that the General Counsel believes is a violation of the Act. Paragraph 12 also provides sufficient notice to the Respondent as to what the General Counsel would be litigating. As such, the Respondent was fully aware, prepared and had the opportunity to litigate this allegation at the hearing. The Respondent was not unfairly prejudice of any due process rights when there was the opportunity to litigate this issue. Accordingly, the Respondent's motion to strike the allegation that the Respondent failed and refused to bargain on July 9 and subsequent to that date is denied.

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contract. *Amax Coal Co. Div. v. NLRB*, 614 F.2d 872 (3rd Cir. 1980) (failure to provide written notice to FMCS violative of Section 8(b)(3) of the Act).

[29] The motion to strike and the opposing responses have been made part of the record. I have identified them as Hearing Exh. 1.

While I find that the Respondent violated the Act when it failed and refused to bargain with MCMA on July 9 and subsequent to that date, it does not necessarily follow that the MCMA employers were coerced by the Respondent and forced to contribute the funds under the GLFEA agreement.

The General Counsel argues that the MCMA employers are being compelled and bound to an agreement negotiated by a multiemployer association (GLFEA) to which they do not belong through coercion by the Respondent in violation of Section 8((b)(1)(B). The General Counsel maintains that the Respondent unlawfully required the MCMA employers to pay wages and fringes under a CBA that some were not a party to. In cases cited to by the General Counsel and, in particular, *Local 70, Teamsters (Emery Worldwide)*, 295 NLRB 1123, 1135 (1989), the Board held that the union violated Section 8(b)(3) by striking to coerce the employer to abandon the agreed-to national agreement and *Commercial Workers Local 1439*, 262 NLRB 309 (1982), the Board found that the union violated Section (b)(3) when the union threatened the employer with economic sanctions when it refused to sign an area agreement and because the threatened economic sanctions had the effect of coercing the employer to select Respondent to be its representative in violation of Section (b)(1)(B).

I find that the Respondent's expectations that the MCMA employer-members should abide by the GLFEA short form agreement did not amount to coercion or had the effect of coercing the MCMA employer-members to select another multiemployer association as its bargaining representative in violation of Section (b)(1)(B).[30] At the hearing, testimony and exhibits from both sides were taken regarding how the fringe benefits would be contributed absent an agreement. Stockwell testified that the contractors would fall back on their short form agreements. Witnesses for the MCMA companies testified as to what they did or did not do with Stockwell's request to contribute the funds to the GLFEA account. The testimony of record shows that witnesses for the MCMA employers were instructed to contribute the monthly fringe funds to GLFEA regardless of whether they had a short form agreement with GLFEA or not (GC Exhs. 11, 18, 22, 23 and 34). The Respondent refused to stipulate that it notified the fringe benefit funds that MCMA contractors should now be paying under GLFEA and that the fringe benefit fund had reiterated that to the MCMA contractors (Tr. 84). Hurst testified that he is and has been providing the wage allocation to GLFEA although Aristeo does not have a short form agreement with GLFEA (Tr. 247).

However, while some MCMA employers paid into the GLFEA account after being notified by the benefit funds that they had incorrectly contributed to MCMA, other MCMA employers continued to contribute to MCMA. Estes testified that he was instructed to use the GLFEA check-off box (box J) in making his company's contribution to the fund even though his company never had a short form agreement with GLFEA. Estes said that he continued to contribute to the funds through MCMA because he had checked off the MCMA box in the short form agreements for Central Conveyor and Conveyor Processing (Tr. 154). Brinker testified that Dearborn continued to abide by the expired contract with MCMA (Tr. 210).[31] There was no

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[30] I would also note that the counsel for the General Counsel did not specifically allege a violation of Section 8(b)(1)(B) of the Act in her complaint. As a consequence, the alleged (b)(1)(B) violation was not fully responded to and subjected the Respondent to a disadvantage with regard to this allegation. Nevertheless, based upon the limited evidence taken, it is my opinion that the Respondent did not coerce the MCMA employer-members to select another association as its bargaining representative in violation of Section (b)(1)(B).

[31] LaLonde testified that someone from the Respondent informed his office at the fringe benefits pension fund that the fund should be collecting the contributions for GLFEA (Tr. 529). However, LaLonde

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testimony proffered that the Respondent attempted to threaten the employers who had not abided by the GLFEA short form agreement with strikes and economic sanctions. Indeed, Stockwell said that he expected the MCMA employers to abide by the short form agreement, but there is no evidence that he had demanded to the employers to contribute the funds through GLFEA or threatened the employers if they refused.

Accordingly, I find that the Respondent did not coerce MCMA employer-members to contribute funds under the short form agreements with GLFEA in violation of the Act.

D. The Remedy

Among other relief sought in this complaint, the General Counsel amended the remedy in the complaint to include

> 2(a) Upon the Charging Party's request, execute the July 1, 2013 agreement described above in paragraph 9(b) and apply it retroactively to July 1, 2013. If the Charging Party does not request execution of the July 1, 2013 agreement, upon request, Respondent must reinstate the terms of the 2010-2013 collective-bargaining agreement.
>
> 2(c) Rescind any agreements made between Respondent and any employer-member including but not limited to the March 27, 2013 through May 31, 2018 agreement between Respondent and the Great Lakes Fabricators and Erectors Association (GFLEA) as it applies to the employer-members of the Charging Party, and make whole all employer-members for any expenditures pursuant to said agreements which they would not have been obligated to make under the July 1, 2013 agreement.

With regard to 2(a) of the remedy requested by the General Counsel, it is clear that where a party refuses to execute a duly negotiated collective-bargaining agreement, the "Board will direct it to do so and to give retroactive effect to the terms of the agreement." *A.W. Farrell & Son*, above, slip op. at 3. Accordingly, it is appropriate to order the execution of the July 1, 2013 negotiated agreement upon request of the charging party or if the request is not made to execute the July 1 agreement, upon request, Respondent must reinstate the terms of the 2010-2013 collective-bargaining agreement.

The amended remedy in 2(c) would also rescind any agreements made between the Respondent and any employer member associations and was not limited to GLFEA. When a legal representative from GLFEA appeared and sought to intervene, the General Counsel strenuously argued against the intervention. The General Counsel maintains that "If we were to bring the issue of which contracts would be rescinded at this time, it would not be efficient for the purposes of the Act" (Tr. 15).

I find it is not appropriate that the collective-bargaining agreements entered into by the Respondent with other multiemployer associations must be rescinded in order to effectuate the remedial nature of an 8(b)(3) violation. The cases cited by the counsel for the General Counsel deal with situations where the Respondent unions affirmatively coerced, engaged in economic sanctions or threatened economic sanctions. Under such circumstances, as stated in

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maintains that the pension fund is a separate entity and it sought legal counsel before allocating the contributions to GLFEA consistent with the short form agreements (Tr. 516, 527). In my opinion, it does not seem likely to support the allegation that the pension fund was ordered by the Respondent to redirect the contributions to the GLFEA account.

Teamsters Local 70 (Emery Worldwide), above, at 1123 and quoting the Ninth Circuit in *NLRB v. Longshoremen ILWU Local 17*, 451 F.2d 1240, 1243 (9th Cir. 1971), the Board held that "if a party who unlawfully refuses to bargain is permitted to retain the fruits of unlawful action, the Act is rendered meaningless."

However, as noted above, here, the situation is entirely different. Stockwell and other union officials never threatened, coerced, or engaged in strikes and other economic sanctions against the MCMA employer-members if they decided not to abide by the GLFEA short form agreements. As most, Stockwell requested and expected the employers to use the GLFEA short form agreements. This is far from forcing the employers to abide by such agreements.

Accordingly, I find and conclude that rescission of any other collective-bargaining agreement would be inappropriate.

Conclusions of Law

1. The Charging Party is a multiemployer association engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Respondent, International Union of Operating Engineers, Local No. 324 and 324-A, is a labor organization within the meaning of Section 2(5) of the Act.

3. At all times material herein, the Respondent has been the exclusive bargaining representative for the employees of the MCMA employer-members in the following appropriate unit of

> All employees employed by employer-members of the Michigan Conveyor Manufacturers Association as described in Articles I(A), II (A, B, and C) and XI of the collective-bargaining agreement between the Union and the Association effective from June 1, 2007 through May 31, 2010, thereafter renewable from year to year, absent proper notification by one party to the other of its desire to change or terminate the collective-bargaining agreement.

4. The Respondent engaged in unfair labor practice in violation of Section 8(b)(3) of the Act when it repudiated the collective-bargaining agreement and tentative agreement that the parties duly negotiated on July 1, 2013, and failing and refusing to abide by the 2010-2013 collective-bargaining agreement.

5. The Respondent violated Section 8(b)(3) of the Act when it failed and refused to bargain with the Charging Party after July 9, 2013 without bargaining to an overall lawful impasse in contract negotiations.

6. The Respondent's acts and conduct described above constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

7. The Respondent did not violate Section 8(b)(1)(B) and 8(b)(3) of the Act when it allegedly coerced the employer-members of MCMA to select another multiemployer association as its collective-bargaining representative.

ORDER

Having found that the Respondent has engaged in certain unfair labor practices within the meaning of Section (b)(3) of the Act, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusion of law and on the entire record, I issue the following recommend[32]

The Respondent, International Union of Operating Engineers, Local 324 and 324-A, AFL-CIO for the State of Michigan, its officers, agents, successor, and assigns, shall

1. Cease and Desist from

(a) Failing and refusing to bargain collectively with the Michigan Conveyor Manufacturers Association (the Association) by failing and refusing to execute the collective-bargaining agreement embodying the terms and conditions of employment for the employees of the Association employer-members agreed upon by the Respondent on July 1, 2013.

(b) In any like or related manner restraining with or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the purposes and policies of the Act.

(a) Upon request by the Association execute the collective-bargaining agreement that was reached with the Association on July 1, 2013, for all employees in the following appropriate bargaining unit:

> All employees employed by employer-members of the Michigan Conveyor Manufacturers Association as described in Articles I(A), II (A, B, and C) and XI of the collective-bargaining agreement between the Union and the Association effective from June 1, 2007 through May 31, 2010, thereafter renewable from year to year, absent proper notification by one party to the other of its desire to change or terminate the collective-bargaining agreement.

(b) Give retroactive effect to the provisions of the collective-bargaining agreement reached with the Association on July 1, 2013.

(c) If the Association does not request execution of the July 1, 2013 agreement, upon request by the Association, reinstate the terms of the 2010-2013 collective-bargaining agreement.

(d) Within fourteen (14) days after service by the Region, post at the Respondent's business offices and meeting halls throughout the State of Michigan, a copy of the attached

[32] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

notice marked "Appendix."[33] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees and members by such means.

(e) Within 14 days after service by the Region, deliver to the Regional Director of Region 7 signed copies of the notice in sufficient numbers for posting by the Association employer-members at their facilities, if it wishes, in all places where notices to employees are customarily posted.

(f) Within 21 days after service by the Region, file with the Regional Director of Region 7 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 23, 2014

Kenneth W. Chu
Administrative Law Judge

[33] If this Order is enforced by a judgment of the United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO MEMBERS

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative to bargain with your employer on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT refuse to bargain collectively with Michigan Conveyor Manufacturers Association (the Association) and employers who have authorized the Association to bargain on their behalf, regarding employees' wages, hours, and other working conditions.

International Union of Operating Engineers, Local No. 324 and 324-A, AFL-CIO (the Union) is the limited collective bargaining representative of the employees in the following appropriate unit:

> All employees employed by employer-members of the Michigan Conveyor Manufacturers Association (the Association) as described in Articles I (A), II (A, B, and C) and XI of the collective-bargaining agreement between the Union and the Association effective from June 1, 2007 through May 31, 2010, thereafter renewable from year to year, absent proper notification by one party to the other of its desire to change or terminate the collective-bargaining agreement.

WE WILL not in any like or related manner restrain or coerce employees in the rights guaranteed to them by Section 7 of the National Labor Relations Act.

WE WILL upon the Association's request, execute the July 1, 2013 agreement and apply it retroactively to July 1, 2013. If the Association does not request execution of the July 1, 2013 agreement, **WE WILL** upon request, reinstate the terms of the 2010-2013 collective bargaining agreement.

WE WILL upon request, bargain with the Association and the employer-members of the Association regarding wages, and other terms and conditions of employment.

LOCAL NO. 324 AND 324-A, INTERNATIONAL UNION OF OPERATING ENGINEERS (IUOE), AFL-CIO

_____
(Labor Organization)

Dated: _____ By:_____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

477 Michigan Avenue, Federal Building, Room 300
Detroit, Michigan 48226-2569
Hours: 8:15 a.m. to 4:45 p.m.
313-226-3200.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/07-CB-109303 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 313-226-3244.